83-1136

No._____

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JERRY L. ROBINETT — PETITIONER

V.

SCHWERMAN TRUCKING CO. INC. — RESPONDANT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JERRY L. ROBINETT
In Pro Se
15704 Chef Menteur Hwy.
New Orleans, Louisiana
70129

QUESTIONS PRESENTED FOR REVIEW

1. Whether the moving party met their legal burden in obtaining Summary Judgment?

2. Whether a Summary Judgment is valid without considering the record first?

3. Whether this suit, in part or in whole, should be considered to be a State action or a federal one? 1/

1/ The Teamster's Union Local 270 has been named as a 3rd party by Schwerman Trucking Co. Inc., the respondant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No._____

JERRY L. ROBINETT PETITIONER

VS.

SCHWERMAN TRUCKING CO. INC.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Jerry L. Robinett, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit entered on 14 September 1983.

OPINION BELOW

The Court of Appeals on 14 September entered its Memorandum decision affirming the summary judgement entered by the Dist-

rict Court. A copy of the memorandum is attached as Appendix A.

The Court denied petitioner's petition for rehearing and suggestion for rehearing en banc on 24 October 1983. A copy of the order is attached as Appendix B.

JURISDICTION

On 14 September 1983 the Court of Appeals entered judgement affirming the summary judgement rendered by the District Court. (App. A) Rehearing was denied on 24 October 1983.(App. B) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1)

THE STATUTES INVOLVED

1. Federal Rules of Civil Procedure, Summary Judgment, Rule 56 (c):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact.....

2. Title 23 Louisiana Revised Statutes, Sections 631, & 632. (Appendix C)

STATEMENT OF THE CASE

Since 1979, this suit was litigated for 2 1/2 years in the Civil District Court for the Parish of Orleans, State of Louisiana where it was instituted pursuant to Louisiana R.S. 23:631 & 632. (App. C) Just prior to the trial, defendant Schwerman Trucking Co. Inc. (Schwerman) filed a third party demand against the Union. (App. D) The Union removed the case to the Federal District Court alleging a federal issue under 28 USC 1441 (c). (C.R. 1, p. 1-9,129) 1/

1/ "C.R. 1, p.1-9,129" refers to the certified Clerk's Record, document 1, pages 1-9, and 129.

Petitioner, Jerry L. Robinett's motion to remand back to the State was denied by the Federal District Court. On 27 October 1982, the Federal District Court granted Summary Judgment to defendant Schwerman on the grounds that Robinett's pleadings did not contain a clause alleging the union breach of duty. (C.R.1, p.175,176)

On 14 September 1983 a panel for the Fifth Circuit Court of Appeals affirmed the Summary Judgement of the District Court. This decision held that Robinett's State wage claim for $45.84 in wages should be viewed as a federal claim under Section 301 of the Labor Management Relations Act (LMRA). However, the Court was silent on the $4,500.00 in penalties asked for in the suit under La. R.S. 23:632. (App.A)

A timely petition for rehearing pursuant to Rules 35(b) and 40 of the Federal

Rules of Appellate Procedure was filed on 28 September 1983, and the petition was denied on 24 October 1983, by the Fifth Circuit. (App. B)

REASONS FOR GRANTING THE WRIT

According to federal law, the defendants are not entitled to Summary Judgment.

In Adickes v. S.H. Kress and Company, this Court specifically noted that there is a "burden of the moving party under Rule 56 (c) to show initially the absence of a genuine issue concerning any material fact".[1] 90 S. Ct. 1609.

As the moving party, Schwerman has not met this legal responsibility. It would be impossible for them to do so because the material fact issue abounds in the record.

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[1] Refers to Rule 56 (c) of the Federal Rules of Civil Procedure.

Schwerman was awarded a summary judgment solely on their contention that Robinett's pleadings needed, but did not contain a clause alleging a union breach of duty; and on this basis the case was dismissed for lack of the material fact issue in the pleadings.

Yet the material issue is not really absent in this case. We need look no further than Schwerman's own pleadings to find this material fact issue. In their own third party demand against the Union, Schwerman admits this fact issue of the Union's breach of duty of fair representation. (App. D-2, at #9)

Accordingly, the Summary Judgment awarded to Schwerman is wholely inconsistent with the law and the usual course of judicial proceedings which require the movant party to establish the absence of triable issues of material fact. Instead,

Schwerman has established the presence of the material fact issue in question by their admission in their pleadings. Thus Schwerman has not discharged their legal responsibility and is not entitled to a summary judgment.

Summary judgment is inappropriate when the Court does not consider the evidence of the material fact issue contained in the record.

In affirming the Summary Judgment awarded to Schwerman, the Court never even took a look at the record. In Robinett's memorandum in opposition to summary judgment; in his affidavit; in his admissions of material facts; and other documents, Robinett had responded with specific facts fulsomely alleging the material fact of the issue of the union's breach of duty of fair representation. Neither the District Court or the Appellate Court ever looked at all this. (C.R. 1, p.132,133,145-148,

159,160,162-164).

It is well settled that the Court must not grant a summary judgment without first searching all these materials in the record for the absence of the material fact issues for trial. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L. Ed. 2d 142 (1970); Coleman v. Darden 595 F. 2d 536 (10th Cir. 1979); Stevens v. Barnard 512 F. 2d 876,878 (10th Cir.); Keiser v. Coliseum Properties Inc. 614 F. 2d 406,410 (5th Cir, 1980); Jones v. Western Geophysical Co. of America 669 F. 2d 283 (5th Cir. 1982)

These materials must be viewed in the light most favorable to the opposing party. United States v. Diebold, Inc. 369 U.S. 654,655, 82 S.Ct. 993,994 (1962); Adickes v. S.H. Kress & Co., supra

Summary judgment is not supposed to be used as a "catch penny contrivance to

take unwary litigants into its toils and deprive them of a trial" if there is evidence of triable issues of material fact in the record. 6 V. Moore's Federal Practice ¶56.15(1.-05). Since the record does contain all this evidence of the material fact issue, summary judgment was inappropriate.

There does appear to have been a genuine misunderstanding made by the lower Courts over Robinett's remarks in the District Court. Mention was made in the appellate panel's decision of the belief that Robinett had refused to amend his pleadings. (App. A refers to App. E) [1]

Not being an attorney trained in the art of elocution and legal argument, Robinett fell victim to a misunderstanding or misinterpretation of his remarks. The appellate panel thought Robinett was refusing to amend his pleadings as the

---

[1] App. E is excerpt of transcript C.R.2

District Court wanted. Robinett was not at all refusing to do this. He just wanted the Court to consider if the pleadings could be amended in an alternative fashion instead. That is, he wanted to know if he would be allowed to delete the wage demand from the suit altogether, and then proceed only under the penalty provision of La. 23:632 which remained in the suit. He believed that would have removed the federal issue from the suit, and already had a motion to that effect set for hearing on that date. The Judge never ruled on this but went ahead and dismissed the suit. (App. E; C.R.2)

Unfortunately, this request for the alternative amendment was misinterpreted as a refusal to do what the Court wanted. (App. A). So 4 years of litigation was lost due to a misunderstanding.

To establish whether Robinett is entitled to any remedies under Louis-

iana Laws

In the third Circuit the District Courts have held that a suit should not be viewed as a section 301 LMRA action unless the complaint alleges the contract was breached and names specific provisions of the contract which were violated. Chasis v. Progress Manufacturing Co., 256 F. Supp. 752,753; Davis v. Ohio Barge Line, Inc., 535 F. Supp. 1325,1326.

In conflict with that, the Fifth Circuit panel in this case believes those provisions aren't necessary in the complaint and feels a suit arising under Louis-iana R.S.23:631 should be viewed as a section 301 LMRA anyway. However the panel is silent on the penalties under La. RS. 23:632.

In Vaca v. Sipes this Court established the Rule that State remedies are not pre-empted even if they touch on the LMRA

when local concern and responsibility is at stake. 17 L. Ed. 2d 852.

The Louisiana laws here, have been on the books since 1920. They protect the earned wages of its individual citizens from employer encroachments and abuse. These laws don't take effect until (3) three days after the employment has ended.

In his affidavit, Robinett testified the employer knew the wages should have been paid but mischievously decided to block payment and set up procedural pitfalls in order to frustrate Robinett. These penalties under La. R.S. 23:632 would correct all the wrong these actions have caused Robinett in the (5) five years since then. (C.R. 1, p.158).

A decision is needed by this high Court to settle how these Louisiana laws are affected by federal law.

CONCLUSION

For the foregoing reasons, petitioner Jerry L. Robinett respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Jerry L. Robinett

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DATED: 8 December 1983.

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JERRY L. ROBINETT

PETITIONER

V.

SCHWERMAN TRUCKING CO. INC.

RESPONDANT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3681
Summary Calendar

JERRY L. ROBINETT,

Plaintiff-Appellant

versus

SCHWERMAN TRUCKING COMPANY, INC.,

Defendant-Appellee.

Appeal From the United States District Court, For the Eastern District of Louisiana

---

(September 14, 1983)

Before RUBIN, JOHNSON, and WILLIAMS
Circuit Judges.

PER CURIAM:

Pro se appellant Jerry L. Robinett filed this action in civil district court for the Parish of Orleans, Louisiana against his former employer, Schwerman Trucking Co., Inc. (Schwerman) alleging that Schwerman had refused to pay him $45.84 in wages. Schwerman answered asser-

ting that Robinett's dispute was governed by a collective bargaining contract between Schwerman and the Southern Conference of Teamsters and filed a third-party action against the Union. The Union removed the action to federal district court and Robinett's case was dismissed pursuant to a summary judgment entered against him. We affirm the district court's judgment.

Initially, Robinett contends that this action is governed by state law since he never intended to invoke the provisions of section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 (a). According to Robinett, the action does not involve section 301 and was improperly removed.

In order for removal of an action to be proper, the federal district court must have original jurisdiction to hear the subject matter of the complaint. Under 28 U.S.C. § 1441 (a) and (b), removal is pro-

per if the plaintiff's claim arises under the Constitution, treaties, or laws of the United States. Significantly, if the allegations at the heart of the plaintiff's complaint make out a claim arising under federal law, removal is proper even if the plaintiff failed to refer to federal law. See Jones v. General Tire & Rubber Co., 541 F. 2d 660, 663-64 (7th Cir. 1976).

Section 301 (a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Although a section 301 action may be brought in either state or federal court, see Jones v. General Tire & Rubber Co., 541 F. 2d at 663-64, it is well settled that, when federal law and local law conflict, federal substantive law governs the rights of the

parties. Local 174, Teamsters Warehousemen & Helpers of America v. Lucas Flower Co., 369 U.S. 95 (1962). According to federal substantive law, when a labor dispute arises that falls within the scope of a collective bargaining agreement, the parties are relegated to the remedies provided in the contract. Piggly Wiggly, Inc. v. Piggly Wiggly Warehouse Independant Truck Drivers Local No. 1, 611 F. 2d 580 (5th Cir. 1980). We have little difficulty concluding that Robinett's complaint falls within the provisions of the collective bargaining agreement and hence is governed by section 301.

It is undisputed that Robinett was an employee of Schwerman, a company, in an industry affecting commerce, which had a collective bargaining agreement with Teamster Local 270. The agreement contains a binding grievance arbitration clause. See Record, vol. 1 at 102. Robinett's suit to

collect wages necessarily was based upon the collective bargaining agreement since the wages allegedly due result from work performed while the collective bargaining agreement was in effect and while Robinett was a member of the Union. The issue of whether Robinett was entitled to the wages falls specifically within the scope of the collective bargaining agreement, which expressly deals with employee wages.

Because Robinett's claim falls within the scope of the contract, he must abide by the remedy the contract provides - a grievance procedure that culminates in binding arbitration. If we were to hold that Robinett may proceed under the state wage-payment statute on which he relies, he would be able to side-step completely the arbitration mechanism mandated by the contract. Cf. Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614 (1965). The Supreme Court has long recognized that the Labor

Management Relations Act embodies a federal labor policy favoring arbitration. See, e.g., United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343 (1960). It is here that the conflict between federal and state law arises: allowing Robinett to circumvent the arbitration clause would frustrate federal policy. Hence, federal labor law governs this dispute, the federal district court had original jurisdiction, and removal was proper.

Robinett also argues that his claim is not covered by section 301 because he is no longer an employee of Schwerman. The important fact, however, is that the events that led up to the claim occurred while Robinett was working for the company and covered by the contract. In Republic Steel the Supreme Court held that employees were bound by their contract's grievance procedure even after their employer had gone out

of business. 85 S.Ct. at 619. As long as the union's grievance procedure was still in operation, Robinett was bound to avail himself of it. Id. at 113-15.

Robinett also contends that the district court erred by granting a summary judgment in favor of Schwerman and the Union. Having reviewed the evidence in the light most favorable to Robinett, drawing all inferences from the evidence in his favor, we conclude that the district court properly entered a summary judgment since there was no genuine issue of material fact, and Schwerman and the Union were entitled to judgment as a matter of law. See Jones v. Western Geophysical Company of America, 669 F. 2d 280,283 (5th Cir. 1982).

As we have seen, Robinett's claim for wages is governed by the provisions of the collective bargaining agreement entered into between Schwerman and the Union, which contains a binding arbitration provision.

Thus, Robinett is precluded from seeking relief in this court unless the Union's grievance process has been flawed by a breach of the Union's duty to represent Robinett honestly and in good faith without invidious discrimination or arbitrary conduct. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976). To prevail, Robinett was required to allege that the Union had breached its duty of fair representation. Id. This he did not do. The district court informed Robinett that his allegations were insufficient to avoid summary judgment but he refused to amend his pleadings or present additional summary judgment evidence. Instead, Robinett simply stated that he felt that state law was controlling and that removal was improper. Hence, no material factual dispute was presented regarding the fairness of the Union's representation. Clearly the district court was warranted in granting the summary judgment.

While Robinett alleged in his reply brief that the Union breached its duty of fair representation, he refused to make this claim by amending his complaint in the trial court even after being expressly afforded an opportunity to do so. This tardy change of the basis of the action comes too late. He had ample opportunity to assert this claim in the district court, and his failure to do so precludes him from asserting it now.

Finally, Robinett contends that section 301 is unconstitutional. This contention is without merit. See Textile Workers of America v. Lincoln Mills, 353 U.S. 448 (1957).

Accordingly, the district court's judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-3681
Summary Calendar

JERRY L. ROBINETT,

Plaintiff-Appellant

versus

SCHWERMAN TRUCKING COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court, for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 14, 5 Cir., 1983 F.2d)

(October 24, 1983)

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

B

WAGES PAYABLE IN THREE DAYS
R.S. 23:631-632

WAGES MUST BE PAID WITHIN THREE DAYS

Section 631. **Discharge or resignation of employees; payments within three days after termination of employment.**

A. Upon the discharge or resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day week or month, not later than three days following the date of discharge or resignation. Said payment shall be made at the place and in the manner which has been customary during the employment, except that payment may be made via United States mail to the laborer or other employee, provided postage has been prepaid and the envelope properly addressed with the employee's or laborer's current address as shown in the employer's records. In the

event payment is made by mail the employer shall be deemed to have made such payment when it is mailed. The timeliness of the mailing may be shown by an official United States postmark or other official documentation from the United States Postal Service.

B. In the event of a dispute as to the amount due under this section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section.

C. With respect to interstate common carriers by rail, a legal holiday shall not be considered in computing the three day period provided for in Subsection A of this Section.

(Source: Acts 1920, No. 150;1, Acts 1936, No. 138;1, Acts 1977, No. 317:1.)

PENALTY

Section 632. Liability of employer for failure to pay; attorney fees.

Any employer who fails or refuses to

comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee' demand for payment is made until the employer shall tender or pay the amount of wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making the first demand following discharge or resignation.

(Source: Acts 1920, No. 150;2, Acts 1936, No. 138:1, Acts 1964, No. 422;1, Acts 1977, No. 317;1.)

ISSUED BY:
Louisiana Department of Labor
Office of Labor
J. T. Armatta, Assistant Secretary

CIVIL DISTRICT COURT FOR

THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 79-17394 DIVISION "I" DOCKET NO.

JERRY L. ROBINETT

VERSUS

SCHWERMAN TRUCKING COMPANY, INC.

FILED:_____ _____

DEPUTY CLERK

THIRD PARTY DEMAND

The petition of Schwerman Trucking Company, Inc., hereinafter referred to as Third Party Plaintiff, a foreign corporation licensed to do business in the State of Louisiana, with respect represents:

1.

Named Third Party Defendant herein is the Southern Conference of Teamsters and Local Union No. 270, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, a/k/a General Truck Drivers, Chauffeurs, Warehousemen and Hel-

pers Local Union No. 270 (hereinafter referred to as the "Union").....

(Subdivisions 2 thru 8 omitted here)

9.

Upon information and belief the Union breached its duty of fair representation to plaintiff by failing to pursue a resolution of the grievance which plaintiff filed with the union on December 12, 1978.

10.

Any damages suffered by plaintiff as a result of the alleged failure of Third Party Plaintiff to pay plaintiff the wages he alleged are due are attributable soley or, alternatively, substantially to the conduct of the union.

(Remainder of petition/complaint is omitted here)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JERRY ROBINETT

VS.

SCHWERMAN TRUCKINC CO., INC.

CIVIL ACTION

No. 82-1469 E

Proceedings in Open Court October 27, 1982. The HONORABLE FRED J. CASSIERY, Judge presiding.

(Below, excerpted portions of hearing transcript, taken from pages 3,6 and 8)

BY THE COURT:

All right. In that case, Mr. Robinett you may stand up there. As I told you before this is a case that is governed by Federal law and not State law. Your rights if you have any must be governed by the Federal law and any rights you have against this company and against this union will arise under the collective bargaining agreement that existed between the union and the company.

Now, the only way you can get into this court, after the union failed and refused

for whatever reason, to process your case to arbitration, the only way you can get into this court is to allege that they were not in good faith, that you had a good case and they deceived you or that they deliberately refused to take your case to arbitration when they should have. Now, you have not done that. You have not alleged that in your petition. You are still relying on the State law which says that they are supposed to pay you from the day you left. That law does not apply. Federal law applies..... (from page 3)

BY MR. ROBINETT

O.K. I also have a matter pending before this Court today on the, on my motion to amend my pleadings. Can we go to that right now? (from page 6)

BY MR. ROBINETT

.....I felt that their entire argument in their summary judgment hinges upon their claim ..... that it constitutes

a breach of contract claim based simply on the $45 in wages. They can't claim the penalties constitute a breach of contract because there is nothing in the contract that says anything about penalties. So, I felt that I had a claim for the wages under State law but since that is only one per cent of my entire petition that it would save a lot of argument.....by deleting that from my petition, by taking that out. That would leave only the penalties. (in the suit) Therefore, it could no longer be alleged that my law suit alleges a breach of contract.....[1] (from page 8)

1/ Robinett was asking if he could remove the wage demand from the suit and then proceed only for the penalties under Louisiana R.S. 23:632, which is all that would have remained in the suit.